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COMMENTS

THE SECOND CIRCUIT'S INTERPRETATION OF EXIGENT CIRCUMSTANCES IN *UNITED STATES v.* *MacDONALD*: THE EROSION OF THE WARRANT REQUIREMENT

The fourth amendment to the United States Constitution¹ was framed and adopted to protect individuals from unreasonable invasions of their privacy and security.² To deter arbitrary searches

¹ U.S. CONST. amend. IV. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Id.

² See *Payton v. New York*, 445 U.S. 573, 583 (1980) (arbitrary searches and seizures motivated adoption of fourth amendment); *United States v. Reed*, 572 F.2d 412, 422 (2d Cir.) (fourth amendment protects "reasonable expectations of privacy"), *cert. denied*, 439 U.S. 913 (1978).

The fourth amendment was adopted to prevent governmental intrusions similar to those that had occurred under British rule. See R. DAVIS, *FEDERAL SEARCHES AND SEIZURES* § 1.11, at 3-5 (1964). In an effort to suppress the smuggling trade during colonial times, British officials utilized "general warrants," or "writs of assistance," to authorize the search of private premises. See E. FISHER, *SEARCH AND SEIZURE* § 3, at 4-5 (1970). These general warrants gave government officials the discretion to enter and search any premises suspected of housing smuggled goods. See *id.* This general search power was widely abused, and hatred of the practice was a strong motivating factor behind the Revolutionary War. See Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 108 (1987).

After the war, memory of the writs lingered on, and the omission from the Constitution of any provision dealing with searches and seizures was the subject of national criticism. See 1 W. LAFAYE, *SEARCHES AND SEIZURES* § 1.1(a), at 4-5 (2d ed. 1987) [hereinafter W. LAFAYE, *SEARCHES*]. To remedy this deficiency, the fourth amendment was designed "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). "This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to in-

and seizures, the fourth amendment requires law enforcement officers to procure a warrant before entering uninvited upon private premises.³ Realizing, however, that an absolute warrant require-

vade . . . [an individual's] privacy in order to enforce the law." *McDonald v. United States*, 335 U.S. 451, 455 (1948).

The fourth amendment has spawned much controversial litigation, but the holdings of the many cases are often difficult to reconcile. See *Chapman v. United States*, 365 U.S. 610, 618-19 (1961) (Frankfurter, J., concurring) (discussing inconsistency of decisions). "No area of the law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate . . ." LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. ILL. L.F. 255, 255 [hereinafter LaFave, *True Law*]. The reason for the inconsistency seems to stem from a combination of the amendment's ambiguity, see 1 W. LAFAVE, *SEARCHES*, *supra*, § 1.1(a), at 5, and the reality that a court's determination that a search was unreasonable is likely to result in freedom for a guilty defendant. See LaFave, *True Law*, *supra*.

Despite their natural disdain for allowing "[t]he criminal . . . to go free because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926), the courts have generally maintained their focus on the fundamental nature of the rights protected by the fourth amendment. See *Payton*, 445 U.S. at 597 ("freedom of one's house" is vital to liberty). They recognize that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society," *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961), and have applied the protections of the fourth amendment "to all invasions on the part of the government and its employees of the sanctit[ies] of a man's home and the privacies of life." *Payton*, 445 U.S. at 585 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1885), *overruled on other grounds by* *Warden v. Hayden*, 387 U.S. 294 (1967)).

³ See *McDonald*, 335 U.S. at 453 ("with few exceptions," police must show probable cause and obtain warrant from magistrate before entering private premises); *Johnson v. United States*, 333 U.S. 10, 14 & n.3 (1948) (fourth amendment requires that magistrate, rather than police officer, make determination of sufficient probable cause to enter private premises); *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970) ("judicial officer . . . determine[s] whether the security of our society . . . requires that the right of privacy yield to a right of entry, search and seizure"); see also Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1469 (1971). "Requiring a magistrate to determine probable cause before a search may provide protection against searches without probable cause . . . by substituting the decision of an outsider for that of a policeman who may be too excited, prejudiced, or uninformed to make an accurate judgment." *Id.* "The prominent place the warrant requirement is given in . . . [Supreme Court] decisions reflects the 'basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.'" *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979) (quoting *United States v. United States Dist. Ct.*, 407 U.S. 297, 317 (1972), *modified sub nom. United States v. Ross*, 456 U.S. 798 (1982)).

If it is determined that law enforcement officials made an illegal warrantless entry into private premises, the evidence obtained in the course of the ensuing search will be excluded from the defendant's trial. See Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternatives*, 57 TUL. L. REV. 648, 648 (1983). The principal purpose of the exclusionary rule is to deter lawless conduct by police officers, see *Terry v. Ohio*, 392 U.S. 1, 12 (1968), but its effectiveness in that capacity has been the subject of vigorous debate for many years. See 1 W. LAFAVE, *SEARCHES*, *supra* note 2, § 1.2, at 21. The rule has endured, however, primarily because no "meaningful alternative" has been found. *Id.* § 1.2(c), at 31.

ment would severely impede effective law enforcement, courts have concluded that law officers need not obtain a warrant when confronted with an "immediate major crisis" or "exigent circumstances."⁴ Nonetheless, courts have remained alert to, and have struck down, attempts by law officers to circumvent the fourth amendment by simply manufacturing exigencies.⁵ Recently, however, in *United States v. MacDonald*,⁶ the United States Court of Appeals for the Second Circuit substantially expanded the exigent-circumstances exception to the warrant requirement by concluding that law enforcement officials, provided they act "in an entirely lawful manner," may make a warrantless entry into a private apartment pursuant to an exigency of their own making.⁷

⁴ See *Reed*, 572 F.2d at 424. Warrantless entries by law enforcement officials are sanctioned only in "a few specifically established and well-delineated situations." *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Failure to obtain a warrant is justified, for example, when the situation involves "exigent circumstances." See *Payton*, 445 U.S. at 587-88. "The phrase 'exigent circumstances' refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization." *United States v. Campbell*, 581 F.2d 22, 25 (2d Cir. 1978); see also *United States v. Korman*, 614 F.2d 541, 550 (6th Cir.) ("exigent circumstances" require probability that "risk will become a reality"), *cert. denied*, 446 U.S. 952 (1980); 2 W. LAFAVE, *SEARCHES*, *supra* note 2, § 4.1(a), at 119 (exigency exception "narrowly circumscribed" when search requires entry to private premises).

Although the warrant requirement is dispensed with under exceptional circumstances, a warrant "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). "It is, or should be, an important working part of our machinery of government," operating to protect the public from "overzealous" law enforcement officials. *Id.* At least one commentator, however, while acknowledging a stricter trend, has concluded that many courts employ a relatively broad interpretation of "exigent circumstances" that allows routine approval of intrusive police action. See Note, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167, 180-81 (1977).

⁵ See *United States v. Santana*, 427 U.S. 38, 48-49 (1976) (Marshall, J., dissenting) (arrest of suspect timed to create exigency renders warrantless search or arrest of other suspects unlawful); *United States v. Segura*, 663 F.2d 411, 417 (2d Cir. 1981) (warrantless search invalid when agents deliberately create exigent circumstances), *aff'd*, 468 U.S. 796 (1984); *United States v. Gomez*, 633 F.2d 999, 1006 (2d Cir. 1980) (courts must beware of attempts by agents to terrorize occupants of premises in hopes of creating exigency), *cert. denied*, 450 U.S. 994 (1981); 2 W. LAFAVE, *SEARCHES*, *supra* note 2, § 6.5(b), at 662 (claims of exigent circumstances have been rejected when "police unnecessarily warn[] those within by seeking to question them or by asking for their consent to search the premises"); see also Note, *Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need For Strict Standards*, 70 J. CRIM. L. & CRIMINOLOGY 255, 267 (1979) ("if police were able to forego the warrant requirement by creating an emergency, then the fourth amendment would become a nullity").

⁶ 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1071 (1991).

⁷ *Id.* at 772. "[T]he fact that the agent may be 'interested' in having the occupants

In *MacDonald*, agents of the New York Drug Enforcement Task Force, having acquired persuasive evidence that a narcotics enterprise was operating from a Manhattan apartment that they had under surveillance, planned an undercover drug purchase.⁸ Shortly before ten o'clock one evening, one of the agents gained entry to the apartment and purchased a package of marijuana using a prerecorded five dollar bill.⁹ The agent then left the premises and reported to the task force that he had observed six men, two guns, large quantities of cash, and what appeared to be marijuana and cocaine within the apartment.¹⁰

Approximately ten minutes after the undercover purchase,¹¹ without any discussion concerning the procurement of a warrant,¹² seven of the task force agents approached the apartment.¹³ The agents knocked on the apartment door and identified themselves.¹⁴ Immediately, they perceived "the sounds of shuffling feet" from within the apartment and were notified by a radio communication from agents stationed outside that the occupants of the premises were attempting to flee through a window.¹⁵ After forcing entry into the premises with a battering ram, the agents arrested five of the suspects, including MacDonald, and seized the weapons,

react in a way that provides exigent circumstances and may 'fully expect[]' such a reaction does not invalidate action that is otherwise lawful." *Id.* (quoting *Horton v. California*, 110 S. Ct. 2301, 2308 (1990)).

⁸ *Id.* at 768. The agents had been advised by a confidential informant that two apartments within a certain Manhattan apartment building were being used in a narcotics trafficking operation. *Id.* Surveillance was established outside the building, and the agents observed a steady stream of persons making brief visits to a first-floor apartment. *United States v. Thomas*, 893 F.2d 482, 483 (2d Cir.), *vacated sub nom. United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1071 (1991). The agents stopped a car that they followed from the apartment building and questioned the car's occupants; they were told that narcotics were being sold in the apartment and that sales were not limited to regular customers. *Id.* at 484.

⁹ *MacDonald*, 916 F.2d at 768.

¹⁰ *Id.* Upon being admitted to the apartment, the agent observed a man sitting in a chair who was pointing a cocked semi-automatic weapon in his general direction. *Id.* The defendant, MacDonald, was sitting and counting money, but had a .357 magnum revolver within his reach. *Id.* The agent also observed four other men and large quantities of drugs in the apartment. *Id.*

¹¹ *Id.*

¹² *Id.* at 776 (Kearse, J., dissenting).

¹³ *United States v. Thomas*, 893 F.2d 482, 483 (2d Cir.), *vacated sub nom. United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1071 (1991).

¹⁴ *MacDonald*, 916 F.2d at 768.

¹⁵ *Id.*

money, and narcotics that were in plain view.¹⁶

Following a jury trial, the United States District Court for the Southern District of New York entered judgment convicting MacDonald of several drug-related offenses.¹⁷ On appeal, a divided panel of the Second Circuit determined that the evidence seized from the apartment should have been excluded from MacDonald's trial because of the agents' failure to obtain a warrant.¹⁸ Consideration en banc was granted, and the court of appeals vacated the panel decision and affirmed the district court's judgment of conviction.¹⁹

Writing for the court, Judge Altimari made the following determinations: (1) the agent who made the controlled purchase was authorized to arrest the occupants of the apartment at the time of the purchase,²⁰ and a mere ten-minute absence from the premises did not render the agent's lawful reentry subject to a requirement that he first obtain a warrant;²¹ (2) exigent circumstances justifying a warrantless entry existed once the undercover agent had firsthand knowledge of the suspects' undertakings inside the apartment;²² and (3) in any event, the task force agents acted properly

¹⁶ *Id.* The sixth man had apparently departed from the apartment during the interval between the undercover agent's exit and his return with reinforcements. *Id.*

¹⁷ *Id.* at 767. MacDonald was convicted "of possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2, and of the use of a firearm in connection with a narcotics offense in violation of 18 U.S.C. §§ 924(c) and 2." *Id.*

¹⁸ *See* United States v. Thomas, 893 F.2d 482, 490 (2d Cir.), *vacated sub nom.* United States v. MacDonald, 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1071 (1991). The court criticized the task force agents for their failure to secure a warrant, noting that the agents did not even discuss the possibility of contacting a magistrate. *Id.* Concluding that no "urgent need" for warrantless entry existed, the court remanded the case to the district court for a determination of whether the defendant, who did not own the apartment, had standing to challenge the entry as one who occupied the premises and "had dominion and control over them by leave of the owner." *Id.*

¹⁹ *MacDonald*, 916 F.2d at 767.

²⁰ *Id.* at 771. Law enforcement officials, without a warrant and acting as private citizens, may accept an invitation to enter a person's home to transact unlawful business "without infringing upon the occupant's fourth amendment rights." United States v. Davis, 646 F.2d 1298, 1301 (8th Cir.), *cert. denied*, 454 U.S. 868 (1981); *accord* 2 W. LAFAVE, SEARCHES, *supra* note 2, § 6.1(c), at 582.

²¹ *MacDonald*, 916 F.2d at 771. "This is not the kind of scenario that needs the detached judgment of a neutral magistrate to determine whether there is probable cause for an arrest and search." *Id.*

²² *Id.* at 770. The court stated that this finding was "[c]onsistent with well-settled law." *Id.* But *see id.* at 773 (Kearse, J., dissenting). "I know of no law, settled or otherwise, that mere firsthand knowledge of a crime constitutes exigent circumstances permitting a warrantless entry." *Id.*

in seeking to question the occupants of the premises without first obtaining a warrant,²³ and the resulting commotion from within the apartment justified their forced entry as a necessary means to prevent the destruction of evidence.²⁴ Judge Altimari stated that the court would not engage in "futile speculation" as to whether the agents had manufactured an exigency.²⁵ He held that as long as law enforcement agents do not act "unlawfully," their creation of exigent circumstances should be deemed appropriate.²⁶

Judge Kearse, in a dissent joined by Judge Feinberg and Chief Judge Oakes, disputed each of the majority's justifications for the warrantless entry.²⁷ She contended that the agents' entry was illegal because their return to the apartment was merely a pretext designed "to precipitate a crisis that did not then exist."²⁸ The dissent condemned the majority's endorsement of the agents' actions, observing that it would result in the practical elimination of the warrant requirement in narcotics cases.²⁹

The *MacDonald* court's decision, seemingly praiseworthy in light of the gravity of the offense and the certainty of the defendant's guilt, must be viewed with an eye towards its long-term effects. In the process of affirming the defendant's conviction for sev-

²³ *Id.* at 771. "The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from acting lawfully to afford the suspects the opportunity to do so." *Id.*

²⁴ *See id.* at 770 (district court's finding that danger of destruction of evidence existed is not clearly erroneous); *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973). "When government agents . . . believe contraband is present and . . . they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified." *Id.*

²⁵ *MacDonald*, 916 F.2d at 772.

²⁶ *Id.*

²⁷ *Id.* at 773 (Kearse, J., dissenting). The dissent contended that the court had erred in finding that the undercover agent was not required to secure a warrant to reenter the premises after he had left. *Id.* Judge Kearse reasoned that the agent's presence in the apartment was lawful because it was with the occupants' consent, but argued that there was "no basis for inferring" that this consent extended to the agent's return. *Id.* at 773-74 (Kearse, J., dissenting). In addition, the dissent argued that by concluding that an exigency was present when the undercover agent gained knowledge of the activities within the apartment, the majority had confused exigent circumstances sufficient for a warrantless entry with the mere existence of probable cause. *Id.* at 773 (Kearse, J., dissenting). Finally, contending that the exigent circumstances that did arise were deliberately created by the agents, the dissent urged that the court "should not endorse such contrivances by law enforcement officials in their efforts to circumvent the Fourth Amendment's warrant requirement." *Id.* at 776 (Kearse, J., dissenting).

²⁸ *Id.*

²⁹ *Id.* at 776-77 (Kearse, J., dissenting).

eral drug-related crimes, the Second Circuit has unnecessarily provided law enforcement officials, many of whom view the warrant requirement as a nuisance,³⁰ with a convenient method of bypassing this fundamental constitutional protection. This Comment will evaluate the various justifications for the agents' warrantless entry set forth by the *MacDonald* court. In addition, the court's treatment of the exigent-circumstances exception to the warrant requirement will be considered in light of the objectives that inspired the adoption of the fourth amendment. Finally, this Comment will conclude that the Second Circuit could have satisfied the legitimate needs of law enforcement without compromising fourth amendment guarantees by applying the consent exception to the warrant requirement.

I. THE EXIGENT-CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT

The Second Circuit determined that the agents' warrantless entry into private premises was justified by exigent circumstances.³¹ It is suggested, however, that the court's interpretation of exigent circumstances unduly enlarges this exception to the warrant requirement at the expense of fourth amendment protections.

A. *The Inherent Exigency*

The court determined that exigent circumstances existed once the undercover agent gained firsthand knowledge of the activities occurring within the apartment.³² Referring to "the volatile mix of

³⁰ See, e.g., *McDonald v. United States*, 335 U.S. 451, 455 (1948) (sole reason for failure to obtain warrant was inconvenience to officers); see also 3 W. LAFAVE, *SEARCHES*, *supra* note 2, § 8.1, at 147. Law enforcement officials generally "believe that the search warrant procedure is overly technical and time-consuming and that it has no corresponding advantages for them or meaningful protections for the individual." *Id.* (quoting L. TIFFANY, D. McINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 159 (1967)).

³¹ *MacDonald*, 916 F.2d at 770-71.

³² *Id.* at 770. In determining whether exigent circumstances existed, the court considered factors originally set forth in *Dorman v. United States*, 435 F.2d 383 (D.C. Cir. 1970): (1) whether "a grave offense is involved, particularly one that is a crime of violence"; (2) whether "the suspect is reasonably believed to be armed"; (3) whether strong probable cause exists "to believe that the suspect committed the crime involved"; (4) whether there is a "strong reason to believe that the suspect is in the premises being entered"; (5) whether there is a "likelihood that the suspect will escape if not swiftly apprehended"; and (6) whether "the entry . . . is made peaceably." *Id.* at 392-93. In addition, the *Dorman* court stated that the time of entry was another factor to consider; the delay that is incidental to obtaining a warrant at night may sometimes justify proceeding without a warrant. See *id.* at

drug sales, loaded weapons and likely drug abuse" on the premises, the court found that the situation presented "a clear and immediate danger to the law enforcement agents and the public at large."³³ Additionally, the court's opinion focused upon the convenient means available to the suspects for disposing of the evidence of their operation³⁴ and stressed the excessive amount of

393; see also *United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974) (considering difficulty of obtaining warrant on Sunday morning). Alternatively, the late hour of entry may signal its impropriety. *Dorman*, 435 F.2d at 393; see also *United States v. Campbell*, 581 F.2d 22, 26 n.5 (2d Cir. 1978) (nighttime entry increases government's burden to show reasonableness).

Determining that "all of the *Dorman* factors were present," the *MacDonald* court concluded that the agents' entry into the apartment without a warrant was proper. *MacDonald*, 916 F.2d at 770. The court's interpretation of at least two of the elements set forth in *Dorman*, however, seems questionable.

In considering the possibility that the suspects would "escape if not swiftly apprehended," the court stated that this likelihood was confirmed by the fact that one of the occupants of the apartment "escaped" before the agents returned to the premises. *Id.* The court's finding that this "escape" element was satisfied when the suspects were completely unaware that a need to escape existed, combined with the stability of the ongoing criminal operation, makes it difficult to imagine a scenario in which this factor would be found lacking. See *id.* at 775 (Kearse, J., dissenting). Moreover, this construction is inconsistent with many cases, including *Dorman*, that indicate that the likelihood of escape exists when the situation involves an "alerted criminal bent on flight." *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971); see also *United States v. Miles*, 889 F.2d 382, 383 (2d Cir. 1989) (informant's extended absence may have alerted suspects to imminent arrest); *Campbell*, 581 F.2d at 26 (reasonable grounds to believe that suspects were aware of associate's arrest); *Dorman*, 435 F.2d at 388 (robbery suspect left identification papers at crime scene).

The court's apparent struggle to manipulate the facts before it to satisfy all of the *Dorman* elements is also evidenced by its assertion that the "peaceful entry" factor was satisfied by the agents' act of knocking on the door before battering it down. *MacDonald*, 916 F.2d at 770; cf. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990) (valid entry by police when admitted by person erroneously believed to be cotenant); *Dorman*, 435 F.2d at 388 (officers admitted to premises by defendant's mother).

The court in *MacDonald* went to unnecessary lengths in finding each *Dorman* element satisfied because the presence of all of the factors is not required for a court to hold that an exigency existed. See *MacDonald*, 916 F.2d at 770; *United States v. Crespo*, 834 F.2d 267, 270 (2d Cir. 1987), cert. denied, 485 U.S. 1007 (1988); *United States v. Martinez-Gonzalez*, 686 F.2d 93, 100 (2d Cir. 1982). By attempting to prove too much, the court has provided critics with an outstanding illustration of the ineffectiveness of the *Dorman* factors as tools to be used by the judiciary and by law enforcement officers in determining the existence of exigent circumstances. See 2 W. LAFAYE, SEARCHES, *supra* note 2, § 6.1(f), at 599-600 (*Dorman* rule requires "making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors"); Harbaugh & Faust, "Knock On Any Door"—Home Arrests After Payton and Steagald, 86 DICK. L. REV. 191, 224-25 (1982) (*Dorman* test is of no practical use for police); Note, *supra* note 4, at 180 (courts adhering to *Dorman* generally find exigent circumstances in warrantless entry cases).

³³ *MacDonald*, 916 F.2d at 770.

³⁴ See *id.* The suspects apparently had access to another apartment in the building, which the agents could not identify, and might have been able to move the narcotics there.

time that would have been required for the agents to obtain a warrant.³⁵

For the most part, the concerns expressed by the court reflect “the realities of drug transactions”³⁶ and evidence an understandable regard for law enforcement officials who must confront this country’s grave drug crisis on a daily basis.³⁷ It must be recognized, however, that although exigent circumstances may often arise in the course of apprehending drug dealers, a violation of the narcotics laws does not of itself create the type of emergency that justifies a warrantless entry.³⁸ The term “exigent circumstances” signifies the existence of an “immediate major crisis” that de-

Id. The court also noted that the drugs could easily have been flushed down the toilet and that the prerecorded five dollar bill could have been lost in subsequent transactions. *Id.*

³⁵ See *id.* The existing exigencies would have been “aggravated by the additional time required for, and the impracticability of, obtaining a warrant at the late hour of the day.” *Id.*; see also *United States v. Farra*, 725 F.2d 197, 199 (2d Cir. 1984) (substantial risk of loss of evidence outweighs failure to procure middle-of-the-night warrant). But see *United States v. Segura*, 468 U.S. 796, 818 n.1 (1984) (Stevens, J., dissenting). Following the *Segura* decision, the U.S. Attorney’s Office circulated an internal memorandum emphasizing that search warrants should be sought whenever possible, *regardless of the hour*. *Id.* (citing Brief for the United States 40 n.23); *McDonald*, 335 U.S. at 455 (delay and inconvenience of obtaining warrant does not justify bypass of constitutional requirement).

³⁶ *United States v. Diaz*, 814 F.2d 454, 458 (7th Cir.) (quoting district court), *cert. denied*, 484 U.S. 857 (1987).

³⁷ See *MacDonald*, 916 F.2d at 772. “To disallow the exigent circumstances exception in . . . [drug] cases would be to tie the hands of law enforcement agents who are entrusted with the responsibility of combatting grave, ongoing crimes . . .” *Id.*

In support of the court’s concerns, law enforcement officers have “increasingly [become] the targets of drug-related violence” in recent years. Morgenthau, *Losing the War?*, NEWSWEEK, Mar. 14, 1988, at 16; see also *Belated Justice*, TIME, Aug. 13, 1990, at 36 (drug kingpins plotted to have drug enforcement agent kidnapped and tortured).

³⁸ See *Diaz*, 814 F.2d at 458 (no emergency in context of drug transaction); *United States v. Montano*, 613 F.2d 147, 150 (6th Cir. 1980) (drug-oriented offenses not equivalent to exigency); see also *United States v. Costa*, 356 F. Supp. 606, 609 (D.D.C.), *aff’d*, 479 F.2d 921 (D.C. Cir. 1973).

While to some, the exigency of the drug situation may suggest that a loosening of the proscriptions of the Fourth Amendment is in order, this Court will not prostitute the protections of the Bill of Rights in the name of urgency or any other name. The battle to rid society of illicit drugs must be won within the framework of our Constitution lest we achieve a pyrrhic victory. The streets must be rid of the pusher, but not at the expense of justice, nor by compromise of individual liberty.

Id.; cf. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (fact that serious offense is under investigation does not create exigency). But see *United States v. Miles*, 889 F.2d 382, 383 (2d Cir. 1989) (finding exigent circumstances in case of drug possession with intent to distribute); *United States v. Cattouse*, 846 F.2d 144, 146 (2d Cir.) (finding exigency based on practices of drug dealers), *cert. denied*, 488 U.S. 929 (1988).

mands action without delay.³⁹ The existence of such an emergency in *MacDonald* is belied by the fact that the suspects were carrying on business as usual, unaware that the authorities had discovered their criminal activity.⁴⁰ While it is clear that high priority must be accorded to fighting the drug epidemic in this country, it is equally certain that exigent circumstances justifying a warrantless entry do not arise simply because the offense under investigation is a serious one.⁴¹

B. *The Manufactured Exigency*

The *MacDonald* court bolstered its exigency argument by asserting that the agents, after informing the suspects of their presence, justifiably forced entry to prevent the imminent destruction of evidence.⁴² It is well settled that a warrantless entry is permissible if law enforcement officials "reasonably conclude that . . . evidence will be destroyed or removed before they can secure a search warrant."⁴³ However, as a caveat to this principle, it has also been

³⁹ See *United States v. Reed*, 572 F.2d 412, 424 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978); see also *supra* note 4 and accompanying text (discussing exigent circumstances).

⁴⁰ *MacDonald*, 916 F.2d at 775 (Kearse, J., dissenting); see also *Johnson v. United States*, 333 U.S. 10, 14-15 (1948) (warrantless entry illegal despite fact that distinct odor of opium smoke was detected from outside door). "No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant." *McDonald v. United States*, 335 U.S. 451, 455 (1948). "But those reasons are no justification for by-passing the constitutional requirement . . ." *Id.*; see also 2 W. LAFAVE, *SEARCHES*, *supra* note 2, § 6.5(b), at 660. "[I]f nothing has occurred which could be expected to alert the persons inside the premises that they were the object of police suspicion, the mere fact that persons are inside with evidence of a destructible nature is no basis for a warrantless search." *Id.*

⁴¹ See *Montano*, 613 F.2d at 151; see also *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, . . . basic [fourth amendment] law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

Id. (citations omitted).

⁴² *MacDonald*, 916 F.2d at 771.

⁴³ *United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974) (quoting *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973)); see also *United States v. Gomez*, 633 F.2d 999, 1006 (2d Cir. 1980) (warrantless entry justified by sounds indicating destruction of evidence), *cert. denied*, 450 U.S. 994 (1981).

established that failure to obtain a warrant is inexcusable when law enforcement officers go out of their way to create the circumstances that they allege constituted an emergency.⁴⁴

In *MacDonald*, the suspects had been operating a narcotics trafficking operation from the same apartment for approximately four months.⁴⁵ There was no indication that the suspects were aware that they were under surveillance or that the agents' presence in the vicinity might arouse suspicion.⁴⁶ In short, prior to the agents' knocking on the door, there was no reason to fear the loss of essential evidence.⁴⁷ Nonetheless, the Second Circuit endorsed the agents' actions by stating that "the fact that . . . [an] agent may be 'interested' in having the occupants react in a way that provides exigent circumstances and may 'fully expect[]' such a reaction does not invalidate action that is otherwise lawful."⁴⁸

The defendant in *MacDonald*, maintaining that the Second Circuit had condemned the intentional creation of exigencies in *United States v. Segura*,⁴⁹ argued that the evidence seized from the apartment should have been suppressed.⁵⁰ The *MacDonald* court distinguished *Segura*,⁵¹ however, and observed that a prior case denouncing government-created exigencies, which was cited by the *Segura* court, had alluded to "illegal conduct" by law enforcement officials.⁵² Law enforcement agents "do not impermissi-

⁴⁴ See *United States v. Segura*, 663 F.2d 411, 417 (2d Cir. 1981), *aff'd on other grounds*, 468 U.S. 796 (1984); see also *Gomez*, 633 F.2d at 1006 (courts should be alert to officers' attempts to create exigencies); *United States v. Curran*, 498 F.2d 30, 34 (9th Cir. 1974) (officers improperly created exigency by making their presence known to suspects). See generally 2 W. LaFAVE, *SEARCHES*, *supra* note 2, § 6.5(b), at 662 (discussing manufactured exigencies).

⁴⁵ *MacDonald*, 916 F.2d at 775 (Kearse, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Id.* at 776 (Kearse, J., dissenting).

⁴⁸ *Id.* at 772; see also *Horton v. California*, 110 S. Ct. 2301, 2309 (1990) (officer's expectation of finding particular item does not invalidate its seizure).

⁴⁹ 663 F.2d 411 (2d Cir. 1981), *aff'd on other grounds*, 468 U.S. 796 (1984).

⁵⁰ *MacDonald*, 916 F.2d at 768.

⁵¹ *Id.* at 772.

⁵² *Id.* (citing *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980)). The passage upon which the *MacDonald* court focused reads as follows: "What police may not do, of course, is create their own exigencies through illegal conduct and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence or flee." *Allard*, 634 F.2d at 1187.

It should be noted, however, that the *Allard* court was concerned with illegal seizure of evidence rather than the propriety of government-created exigencies. See *id.* at 1184-87. In addition, the cases cited in *Allard* to support the proposition in question do not indicate that improper creation of exigencies is limited to acts that are in themselves illegal. See *id.*

bly create exigent circumstances," the court concluded, when they "act in an entirely lawful manner."⁵³

By holding that law enforcement officials may properly make a warrantless entry by creating an exigency through any act that is not in itself illegal, the Second Circuit has expanded the exception to the point of eliminating the rule.⁵⁴ Furthermore, the court's basis for distinguishing *Segura* is untenable. Although the *MacDonald* court asserted that *Segura* should be read to proscribe only exigencies created by *illegal* government conduct, it is clear that *Segura* made no such distinction.⁵⁵ In fact, the *Segura* court stated that to allow agents to create an exigency by knocking on a suspect's door and alerting him to their presence would allow "too easy a by-pass of the constitutional [warrant] requirement."⁵⁶

It seems quite possible that the *MacDonald* court's expansive opinion will lead to more obtrusive conduct on the part of law enforcement officials.⁵⁷ While it is clear that courts must refrain from

at 1187 (citing *United States v. Korman*, 614 F.2d 541, 550 (6th Cir.) (Merritt, J., dissenting), *cert. denied*, 446 U.S. 952 (1980); *United States v. Allard*, 600 F.2d 1301, 1304 n.2 (9th Cir. 1979); *United States v. Flickinger*, 573 F.2d 1349, 1354-56 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978), *overruled on other grounds by* *United States v. McConney*, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984)). Finally, and perhaps most importantly, the *Segura* court quoted the above passage from *Allard*, but omitted the words "illegal conduct." *See Segura*, 663 F.2d at 415. Therefore, it is questionable for the Second Circuit to assert that "the holding in *Segura* was based on . . . [a] principle," *MacDonald*, 916 F.2d at 772, that the *Segura* court seems to have intentionally excluded from its opinion.

⁵³ *MacDonald*, 916 F.2d at 772.

⁵⁴ *See, e.g., United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974). "[T]his type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded." *Id.*

⁵⁵ *See Segura*, 663 F.2d at 415. The *Segura* court found the agents' entry unjustified because there was "no need to drag *Segura* to his apartment or to knock at the door." *See id.* The court expressed no opinion, however, regarding the legality of these acts apart from the entry. *See id.* To the contrary, the *Segura* court implied that the "entry was . . . unlawful" because no exigent circumstances existed, not because the acts of the law enforcement agents were unlawful in themselves. *See id.*

⁵⁶ *Id.* at 417 (quoting *Rosselli*, 506 F.2d at 630); *see also supra* note 54 (quoting *Rosselli*).

⁵⁷ *See Flumenbaum & Karp, Second Circuit Review*, N.Y.L.J., Oct. 24, 1990, at 6, col. 1. In *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), the Supreme Court summarized why we should be wary of allocating too much latitude to law enforcement officers:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime Crime, even in the privacy of one's own quarters, is, of course, of

unduly burdening law officers in the performance of their duties,⁵⁸ the *MacDonald* court, by providing such a convenient means of avoiding the warrant requirement, has significantly undermined "the right of the people to be secure in their persons, houses, papers, and effects."⁵⁹

II. THE CONSENT EXCEPTION TO THE WARRANT REQUIREMENT

The Second Circuit's broad interpretation of exigent-circumstances was unnecessary in light of the existence of the consent exception to the warrant requirement. The consent exception could have been applied by the court as a less-expansive means to justify the agents' warrantless entry. As Judge Kearse noted: "Consent and exigent circumstances are separate exceptions to the warrant requirement and should not be confused."⁶⁰

Law enforcement officials need not secure a warrant to enter a person's home if they receive valid consent to their entry.⁶¹ In ad-

grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id.; see also *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) ("history shows that . . . police acting on their own cannot be trusted"); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 415 (1974) ("pervasiveness and discontrol of police discretion is everywhere acknowledged"); Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L.F. 655, 672 (procedure allowing police to make probable cause determination would lend itself "to police harassment of unpopular groups").

⁵⁸ See *Trupiano v. United States*, 334 U.S. 699, 709 (1948), *overruled on other grounds* by *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950). "The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement." *Id.*; see also Note, *supra* note 57, at 658. "[A] balance must be struck under the fourth amendment between society's interest in effective law enforcement and the individual's interest in privacy in the home." *Id.*

⁵⁹ U.S. CONST. amend. IV.

⁶⁰ *MacDonald*, 916 F.2d at 773 (Kearse, J., dissenting).

⁶¹ See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (exception to both probable cause and warrant requirements is search conducted with valid consent); *United States v. Purham*, 725 F.2d 450, 455 (8th Cir. 1984) (warrantless arrest in home is valid if there was consent to enter). Courts have upheld otherwise legitimate warrantless entries even when a law enforcement officer obtained consent by concealing his true identity. See 3 W. LAFAYE, *SEARCHES*, *supra* note 2, § 8.2(m), at 223. The Supreme Court has indicated that "when an individual gives consent to another to intrude into an area or activity otherwise protected by the Fourth Amendment, aware that he will thereby reveal to this other person

dition, courts have recognized that "a general public invitation to enter" is extended by certain commercial enterprises,⁶² and law enforcement officers are therefore not required to obtain express consent or a warrant before entering such establishments during business hours.⁶³

In *MacDonald*, the undercover agent demonstrated that the apartment under surveillance was being used for the sale of narcotics⁶⁴ and that admission was granted to virtually anyone appearing

either criminal conduct or evidence of such conduct," the mere fact that the law enforcement officer misrepresented or failed to reveal his identity does not invalidate the consent. *Id.*; see also *Lewis v. United States*, 385 U.S. 206, 210-11 (1966) (evidence admissible when defendant invites undercover agent into his home for drug transaction).

A different type of case is presented when consent is given to one who is known to be an officer, but there is a deception as to the officer's purpose in gaining entry. See 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 3.10, at 348 (1984). "[T]here are decisions upholding the entry-by-consent even though it is clear that the police failed to reveal their purpose and even contributed to the consentor's ignorance of it by stating that they only wanted to talk to the person that they then arrested." 2 W. LAFAVE, *SEARCHES*, *supra* note 2, § 6.1(c), at 583. However, there is authority that indicates that a party's consent will be considered invalid "when the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy." 1 W. LAFAVE & J. ISRAEL, *supra*.

Although consent is a recognized exception to the warrant requirement, the burden of showing the validity of consent is on the prosecutor. See *Schneekloth*, 412 U.S. at 222. In order to meet his burden, a prosecutor must demonstrate that consent was "freely and voluntarily given." *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). See generally 3 W. LAFAVE, *SEARCHES*, *supra* note 2, §§ 8.1-8.6 (detailed analysis of consent searches).

⁶² 1 W. LAFAVE, *SEARCHES*, *supra* note 2, § 2.4(b), at 429 (quoting *United States v. Berrett*, 513 F.2d 154, 156 (1st Cir. 1975)).

⁶³ *Id.* at 429-33; see also *United States v. Blalock*, 578 F.2d 245, 248 (9th Cir. 1978) ("warrantless arrest . . . was lawful since it was consummated in . . . [defendant's] business establishment during business hours").

⁶⁴ See *United States v. Thomas*, 893 F.2d 482, 484 (2d Cir. 1990), *vacated sub nom. United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 1071 (1991). Obviously, the undercover agent's controlled purchase, combined with the observations of the task force during its surveillance of the apartment, provided sufficient evidence that drug trafficking activities were being conducted within the premises. See *id.* Moreover, the contents of the apartment provided evidence that the property was used primarily as a base for the distribution of narcotics and did not serve as an actual residence. See *id.* During testimony, the undercover agent provided the following description of the premises:

The apartment had only one closet; there were no clothes in it. In the kitchen area there was a refrigerator; it had nothing in it but an ice tray. There was a stove; but there were no pots or other cooking utensils. In the bathroom, there were no toothbrushes, razors, or other toiletries. In the living room there were two love seats; but there was no pull-out couch.

Id.

at the door.⁶⁵ Thus, since the premises were clearly employed as a place of business, it follows that the occupants were not entitled to the same degree of fourth amendment protections as would be afforded to the occupants of "a bona fide dwelling place."⁶⁶

Furthermore, common sense dictates that if the agents had chosen to apply for a warrant and their application had been denied, they could have gained admission to the apartment simply by sending one or more of their number to pose as drug purchasers.⁶⁷ Under similar circumstances, other courts have observed that no purpose is served by requiring a warrant if the same invasion will occur whether or not the warrant is issued.⁶⁸ In sum, it appears that since the undercover agent actually observed the defendant's activities within the premises and "exited only to secure proper protection,"⁶⁹ the Second Circuit correctly concluded that this was

⁶⁵ See *id.* ("sales were not being limited to regular customers").

⁶⁶ See *People v. Sperber*, 40 Misc. 2d 13, 15, 242 N.Y.S.2d 652, 656 (Sup. Ct. App. T. 1st Dep't 1963), *aff'd*, 15 N.Y.2d 566, 203 N.E.2d 219, 254 N.Y.S.2d 538 (1964); see also *United States v. Agrusa*, 541 F.2d 690, 697 (8th Cir. 1976) (business premises "are not entitled to the same protection which is afforded a home"), *cert. denied*, 429 U.S. 1045 (1977); *United States v. Ressler*, 536 F.2d 208, 212 (7th Cir. 1976) (defendants "converted their home into a 'commercial center' not protected by the Fourth Amendment") (quoting *Lewis v. United States*, 385 U.S. 206, 211 (1966)); *Handsford v. United States*, 410 F.2d 733, 734 (5th Cir. 1969) (home "loses its broad range of constitutional protections" when "outsiders are invited in to transact business").

When the occupants of a premises, although running a club or business, admit only certain persons, then "the 'implied invitation' to enter extends only to such persons." See 1 W. LAFAYE, *SEARCHES*, *supra* note 2, § 2.4(b), at 432. However, "the actual practice as to admitting persons into such facilities must be considered in making the determination of whether there was in fact a justified expectation of privacy therein." *Id.* at 432-33; *cf.* *United States v. Harris*, 534 F.2d 207, 210 (10th Cir. 1975) (brothel, which granted admittance to virtually anyone who came to the door, was a public place and not a dwelling), *cert. denied*, 429 U.S. 941 (1976).

⁶⁷ See *United States v. White*, 660 F.2d 1178, 1183 (7th Cir. 1981), *rev'd on other grounds*, 706 F.2d 806, 808 (7th Cir. 1983).

⁶⁸ See *id.*; *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir.), *cert. denied*, 484 U.S. 857 (1987). In *Diaz*, the defendant admitted an undercover agent into his hotel room, purportedly to inspect cocaine in anticipation of a purchase. *Id.* at 455-56. The agent exited the room, but returned immediately with other officers to make the arrest. *Id.* Observing that the agent would have been admitted back into the hotel room, the court determined that "the fact that he was assisted by other law enforcement officers . . . cannot make a constitutional difference." *Id.* at 459.

According to the court, the defendant's consent to the agent's presence within the room did not terminate during the agent's short absence. *Id.* The Seventh Circuit cautioned, however, that "this doctrine of 'consent once removed' [applies] only where the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers." *Id.*

⁶⁹ *MacDonald*, 916 F.2d at 771.

"not the kind of scenario that need[ed] the detached judgment of a neutral magistrate."⁷⁰

CONCLUSION

It is fundamental that warrantless entries into private premises are unconstitutional unless made pursuant to certain recognized exceptions. In *MacDonald*, the Second Circuit upheld a warrantless entry made by law enforcement officers by broadly interpreting the exigent-circumstances exception to the warrant requirement. Unfortunately, the court failed to realize that it could have avoided such an expansive construction by simply invoking the consent exception to the warrant requirement. Through its interpretation of what constitutes exigent circumstances and its approval of government-created exigencies, the Second Circuit appears to have diluted the warrant requirement to the point of negating the fourth amendment's force in drug-related cases.

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⁷⁰ *Id.*